Application No.

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Supreme Court of the United States

October Term, 1953

No. 727

KATHERINE SHELLHAMMER, General Administratrix of the Estate of WALTER R. SHELLHAMMER, deceased,
Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI OF THE SUPREME COURT OF THE STATE OF NEW JERSEY

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Supreme Court of the United States

October Term, 1953

No.

KATHERINE SHELLHAMMER, General Administratrix of the Estate of WALTER R. SHELLHAMMER, deceased,
Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI OF THE SUPREME COURT OF THE STATE OF NEW JERSEY

Katherine Shellhammer prays that a writ of certiorari issue to review the mandate of the Supreme Court of the State of New Jersey entered in the above entitled action on the 25th day of January, 1954.

Opinion Below

The opinion of the Supreme Court of the State of New Jersey, not officially reported as yet, is annexed hereto.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254.

Questions Presented

1. Where the evidence permits of but one inevitable, logical inference, does such inference meet the quantum of proof necessary to establish a violation of a statutory duty imposed by the Safety Appliance Act, 45 U. S. C. Section 1, *et seq.*

2. In a death action for damages, predicated on the provisions of the Federal Employers' Liability Act, 45 U. S. C. Section 51, *et seq.*, is circumstantial evidence sufficient to establish a prima facie cause of action where the proven facts permit of but one inevitable, logical inference: that the employee could not have been killed by the train at which he was working but for a breach of duty on the part of his employer.

3. May a railroad create immunity for itself, from the obligations imposed by the provisions of the Federal Employers' Liability Act, *supra*, by asserting its own rules, irrespective of the standard of care long established by railroads generally throughout the United States, as the custom and practice of the trade.

Reasons For Granting the Writ

1. Benefits provided by Acts of Congress, being matters of general public concern, any evasion or curtailment thereof, as in the case at bar, constitute a matter of great and general importance, meriting a review by this Court.

2. Petitioner's offer of proof, as to the established standard of care promulgated by railroads generally throughout the United States and adopted as the established custom and practice of the trade, was rejected by the Trial Court, on the sole basis that only the rules of the respondent railroad were material and admissible as evidence.

Such revolutionary new rule, which in effect grants immunity to a violator of the provisions of the Federal Employers' Liability Act, *supra*, contrary to the intent of Congress,[1] and which permits a railroad, through the expediency of creating its own standard of care to escape liability for breach of a duty recognized by all other railroads, merits review by this Court.

3. Petitioner was denied due process of law[2] by the action of the trial judge in taking from the jury, onto himself, the decision of disputed factual issues, solely on the

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[1] 45 U. S. C., sec. 51 *et seq.*:

"Sec. 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees for negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

[2] Constitution of the United States, Fifth Amendment.

basis that it was for him and not the jury to decide issues of fact when established by circumstantial evidence.

The decision of the lower Court, sustaining the action of the Trial Court in directing a verdict at the close of plaintiff's case under such circumstances, is a matter of general concern and utmost importance and seems to be a denial of a most importance constitutional right: "trial by jury".[3]

Statement

This is an action pursuant to the provisions of the Safety Appliance Act, *supra*, and the Federal Employers' Liability Act, *supra*.

Katherine Shellhammer, as Administratrix on behalf of herself and her three children, Nancy, 16 years of age, Raymond, 10 years of age and Jane, 18 months old, respectively, claimed damage for the wrongful death of her husband, Walter R. Shellhammer.

Walter R. Shellhammer, the decedent herein, was employed by the respondent as a car inspector leader as supervisor of car inspectors (P7a-11).

The decedent was 45 years of age (P11a-25).

On the 13th day of January, 1951, the decedent was last seen alive by John Gumhold, a car inspector, who "okayed" the train (P45a-26). Gumhold told the yardmaster of the train was "okay" (P46a-29). Thereafter, an air test was made by John P. Hann, the engineer, who fixes the time of said test at shortly after 8:00 p. m. (P91a-20). He stated no further tests were made (P88a-

[3] Constitution of the United States, Seventh Amendment.

14).[4] He fixed the time that the train pulled out at about 8:15 or 8:20 p. m. (P91a-16).[5]

James P. O'Donnell, the trainman, fixes the interval of time from the last coupling and the starting of the train at approximately 15 minutes (P67a-19).[6]

The body was discovered by Michael Kobal, a trainman, who reported it to Joseph S. Smith, the yardmaster, at 8:30 p. m. (P19a-18). Decedent's head was between the tracks on the north side of the rail and the body on the south side (P20a-27), 2½ car lengths east of Washington Street crossing and #3 track (P20a-3).

It was stipulated that the decedent was engaged in Interstate Commerce at the time of his death (P11a-6).

It was stipulated that the first sign of blood was found on the second wheel from the front end of the 24th car in the train (P11a-19).

At the close of plaintiff's case, the defendant moved for judgment in its favor, which the Trial Court granted.

From the judgment entered thereon, the plaintiff appealed to the Appellate Division of the Superior Court of the

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[4] Q. During those 10 minutes, did you make any other tests from the last test to the time the train pulled out? A. It is not necessary.
Q. Therefore you didn't make it? A. That is right.
Q. Therefore you made no test after 10 minutes? A. No, sir.

[5] Q. The time when you got it completely finished and assembled ready to go? A. It was about 8:15 or 8:20 when we pulled out.

[6] Q. And it was after that coupling that the train moved out, 15 minutes later. Is that correct? A. You are not figuring what transpired between that period, you are just talking time?
Q. That is right. A. I would say, from the time we made that coupling, I would say about 15 at the latest; I figure 15 minutes, maybe not to a minute, but 15 minutes I would say.

State of New Jersey which Court affirmed the judgment of the Trial Court on the 29th day of April, 1953.

Plaintiff then petitioned the Supreme Court of New Jersey for certification to the Appellate Division to review the judgment of the Appellate Division affirming the Superior Court of New Jersey, which petition was granted on September 14, 1953.

The Supreme Court of the State of New Jersey, after argument on November 30, 1953, affirmed the judgment of the Superior Court, Appellate Division, on the 25th day of January, 1954.

ARGUMENT

POINT I

The defendant was liable as a matter of law for violating its statutory duty imposed by the Safety Appliance Act, *supra*.

The probabilities or inferences that Shellhammer met his death while in the act of replacing a defective air hose can reasonably be drawn from the following facts:

Shellhammer was last seen alive in respondent's yard at Washington Street, Jersey City, New Jersey (P47a-21, P7a-13). He was not wearing gloves (P80a-34), and there was no air hose on the ground or any place in the vicinity of the train (P63a-5). Later, Shellhammer's body was found in the vicinity of where he had last been seen alive, wearing a work glove on his left hand (P56a-30) and with a discarded air hose near his body (P55a-7). Both Edward J. McKenna and James P. O'Donnell testified to the absence

of any hose coupling in the vicinity prior to the accident (P62a-28-63a-8),[7] (P64a-17-31).[8]

The two car inspectors working under Shellhammer's supervision testified as to the work they each did (P47a-17, P79a-80a). Neither testified that he changed the air hose.

The evidence is that an air hose may spring a leak, the same as an auto tire, without any prior notice (P85a-28-35).

Dr. Manuel Hernandez, Deputy County Physician, explained that when the pressure of the front wheel was

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[7] Q. Did you at any time during the day or evening have occasion to go east of the Washington Street crossing? A. In the tour of duty?

Q. Yes. A. Starting as of 3:00 o'clock?

Q. Yes. A. Why, of course.

Q. How many times would you say your were east? A. That I can't answer.

Q. Were you over in the vicinity of say the third electric pole? A. I may have went even further.

* * *

Q. At any time you were there, did you see any objects such as coupling hose lying around the tracks? A. Not that I can recall.

[8] Q. What time was that you started walking down? A. Approximately 8:00 o'clock, maybe a few minutes before 8:00.

Q. As you walked down did you have a flashlight?

* * *

A. No flashlight. I had a white light and a red light.

Q. Were you able to see the ground? A. Surely.

Q. Did you see any coupling hose there on the south side? A. No, sir.

released, the blood might come down on the after part of the train (P42a-25-P43a-9).[9]

These facts justify the inference that after the two car inspectors had concluded the work, given the "okay" signal and left, that Shellhammer observed that a leak had sprung in the hose between the 23rd and 24th cars; that he thereupon put on his work gloves, shut off the air supply, replaced the defective hose with a good one, threw the defective hose on the ground where it was subsequently found and just as he turned the angle cock to turn the air on, the train started and killed him. Therefore, the direct and proximate cause, in whole or in part, was a defective part of the train break system.[10]

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[9] Q. Doctor, could you give us an opinion as to how long it would take for the blood to come out of the body when a wheel goes over it, and where decapitation has resulted? A. Can I answer that question?

The Court: There is no objection.

The Witness: I believe, this is, of course, my own personal belief—I believe that a train cutting through the neck would seal the injury quite markedly so that it would allow very little bleeding. It crushes the tissues so hard that it would not allow an awful lot of bleeding. Subsequently, as the train went by, I think the expulsion of blood might come down from the after part of the train rather than the part that first came in contact with him. That is my opinion.

Mr. Broadhurst: I am moving to strike that out, the latter part because it is based upon a possibility.

The Court: Strike out the word "subsequently".

[10] Title 45, U. S. C., Section 1: Driving-wheel brakes and appliances for operating train-brake system

It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. Mar. 2, 1893, c. 196, Sec. 1, 27 Stat. 531.

In the case of *Saxton* v. *Delaware & Hudson Co.* (1931) 256 N. Y. 363, 176 N. E. 425, Justice Lehman rendering the decision, Chief Justice Cardozo and Justices Pound, Crane, Kellogg and Hubbs concurring, held that a defendant is liable for the result of a violation of its statutory duty, even if it exercised reasonable care in inspecting the coupler and in operating the freight train.

O'Donnell v. *Elgin, J. & E. Ry. Co.* (1949), 70 S. Ct. 200, 338 U. S. 384, a death action predicated on the Safety Appliance Act, *supra*, and Federal Employers' Liability Act, *supra*, held:

> "But this Court early swept all issues of negligence out of cases under the Safety Appliance Act. For reasons set forth at length in our books, the Court held that a failure of equipment to perform as required by the Safety Appliance Act is in itself an actionable wrong, in no way dependent upon negligence and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence. St. Louis, Iron Mountain & Southern R. Co. v. Taylor, 210 U. S. 281, 294, 28 S. Ct. 616, 620, 52 L. Ed. 1061; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 575-577, 31 S. Ct. 615-617, 55 L. Ed. 582; Delk v. St. Louis & San Francisco R. Co., 220 U. S. 580, 31 S. Ct. 617, 55 L. Ed. 590. These rigorous holdings were more recently epitomized by Chief Justice Hughes, speaking for the Court: 'The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous.' Brady v. Terminal Railroad Ass'n of St. Louis, 303 U. S. 10, 15, 58 S. Ct. 426, 429, 82 L. Ed. 614" (p. 204).
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> "As to the claim based on the Safety Appliance Act, we hold that the plaintiff was entitled to a peremp-

tory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability" (p. 206).[11]

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[11] *Affolder* v. *New York C. & St. L. R. Co.*, 70 S. Ct. 509, 339 U. S. 96, affirmed its decision in, and quoted *O'Donnell* case, *supra*. In the case of *Louisville & Jeffersonville Bridge Co.* v. *U. S.*, 39 S. Ct. 355, 249 U. S. 534, the Court held:

"* * * the construction which the act should receive is not to be found in balancing the dangers which would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply, and that failure to comply will not be excused by carefulness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalence of the requirements of the Act. St. Louis, Iron Mountain etc. Ry. v. Taylor, 210 U. S. 281, 295, 28 S. Ct. 616, 52 L. Ed. 1061; Great Northern Ry. Co. v. Otos, 239 U. S. 349, 36 S. Ct. 124, 60 L. Ed. 322; St. Joseph & G. I. Ry. Co. v. Moore, 243 U. S. 311, 37 S. Ct. 278, 61 L. Ed. 741" (p. 359).

In the case of *Urie* v *Thompson*, 69 S. Ct. 1018, 337 U. S. 163, this concise statement was made:

"In this view the Safety Appliance Acts, together with the Boiler Inspection Act, are substantively if not in form amendments to the Federal Employers' Liability Act. They dispense, for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and

POINT II

The broad purposes of the Federal Employers' Liability Act, *supra*, were defeated by the dismissal of the action at the close of plaintiff's case.

There was a clear breach of duty under the provisions of the Federal Employers' Liability Act, *supra*.

The leading case of *Urie* v. *Thompson*, 69 S. Ct. 1018, 337 U. S. 163, on page 1030 enunciated the existing judicial thought regarding interpretation of the provisions of the purposes of the Federal Employers' Liability Act, *supra*. Justice Rutledge, delivering the opinion of the Court, stated:

> "Considerations arising from the breadth of the statutory language, the Act's humanitarian purposes, its accepted standard of liberal construction in order to accomplish those objects, the absence of anything in the legislative history indicating a congressional intent to require a restricted interpretation * * *

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making proof of such violations is effective to show negligence as a matter of law" (p. 1034).

The case of *Brady* v. *Terminal R. Ass'n. of St. Louis*, 58 S. Ct. 426, 303 U. S. 10, again affirmed this holding as follows:

> "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous" (p. 429).

See also: *Zumwolt* v. *Gardner*, 160 Fed. 2d 298; *N. Y., N. H. & H. R. Co.* v. *Leary*, 204 Fed. 2d 461; *Davidson* v. *Peoria, etc. R. Co.*, 203 Ill. App. 498; *United States* v. *Northern Pac. R. Co.*, 287 Fed. 780; *Williams* v. *New York Central R. R. Co.*, 402 Ill. 494, 84 N. E. 2d 399; *Pennsylvania Co.* v. *U. S.*, Ohio 1917, 241 F. 824, 154 C. C. A. 526, affirming, D. C., 237 F. 471; *U. S.* v. *Chicago & A. R. Co.*, C. C. A. Ill. 1918, 250 F. 101; *McDonald* v. *Great Northern Ry. Co.*, Minn. 1926, 207 N. W. 194, 166 Minn. 87; *Auslender* v. *Boettcher*, 1926, 242 P. 672, 78 Colo. 427.

and the trend of existing authorities dealing with the question, combine to support this conclusion.

We recognize of course that, when the statute was enacted, Congress' attention was focused primarily upon injuries and death resulting from accidents on interstate railroads. Obviously these were the major causes of injury and death resulting from railroad operations. But accidental injuries were not the only ones likely to occur. And nothing in either the language or the legislative history discloses expressly any intent to exclude from the Act's coverage any injury resulting 'in whole or in part from the negligence' of the carrier. If such an intent can be found, it must be read into the Act by sheer inference.

The language is as broad as could be framed: 'any person suffering injury while he is employed'; 'such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier'; by reason of any defect or insufficiency, due to its negligence, in its cars engines, appliances,' etc. On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable. The wording was not restrictive as to the employees covered; the case of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting. To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and

> the constant and established course of liberal construction of the Act followed by this Court."

The case of *Jamison* v. *Encarnacion*, 50 S. Ct. 440, 281 U. S. 635, the Court held:

> "The act is not to be narrowed by refined reasoning. * * * It is to be construed liberally to favor the purposes for which it was enacted * * *" (p. 442).

Lukon v. *Pa. R. Co.*, 131 Fed. 2d 327 at page 329:

> "The Federal Employers' Liability Act was designed to be applied liberally for the protection of railroad and other employees."

Terminal R. Ass'n of St. Louis v. *Schorb*, 151 Fed. 2d 361 at page 365:

> "One of the main purposes of the Federal Employers' Liability Act was to modify the common law barriers against recovery by an employee in a suit against his employer predicated on an industrial accident."

Tracy v. *Terminal R. Ass'n of St. Louis*, 170 Fed. 2d 635 at page 638:

> "Under the Federal Employers' Liability Act the basis of liability is negligence on the part of the employer. The purpose of the Act was * * * to abolish certain common law defenses which had theretofore been available to a railroad company when sued by its employees for injuries received. As the Act now stands it abolishes the defense embodied in the fellow servant rule, the defense of contributory negligence, and the defense of assumption of risk."

O'Rourke v. *Pennsylvania R. Co.*, 194 Fed. 2d 612 at page 615:

> "* * * to provide the railroad employees a remedy for injury or death while engaged in interstate commerce."

Shortly after 8:00 p. m.—An air test was made by John P. Hann (P91a-20).

8:15 or 8:20 p. m.—The train pulled out (P91a-16).

8:35—Discovery of body was reported to yardmaster by Michael Kobal (P19a-18).

When Shellhammer was last seen alive he;—

(a) was not wearing any work gloves,

(b) had no tools in his hands,

(c) there was no air hose on the ground or in his vicinty at the time.

After Shellhammer's death;—

(a) he was wearing a glove on his left hand,

(b) a discarded air-hose was on the ground in his vicinity.

It would seem that such facts would constitute a proper basis for a jury to determine that after the work coupling had been completed and thereafter the air test had been made shortly after 8:00 p. m., that Shellhammer heard air escaping from a connecting air-hose, put on his work gloves, shut off the air cock, discarded the defective hose, replaced it with a good one, turned on the air and the train started before he had a chance to get out from between the 23rd and 24th cars at 8:15 or 8:20 p. m.

These facts would justify an inference that respondent caused the decedent's death.

Whether a duty was violated was for the jury to say.[12]

The defendant was under a duty of so acting, in respect of existing facts and circumstances, as not to inflict upon Shellhammer fatal injury if such could have been avoided by the exercise of that degree of care and prudence which men of ordinary judgment and prudence would reasonably be expected to exercise under like conditions.[13]

In addition to the negligence of the defendant in failing to make diligent and proper inquiry as to whether or not it was safe to start the train under the prevailing circumstances, the respondent was guilty of further fault in violating its own rule (Rule 30), which provides for the ringing of a bell when the engine is about to move (P28a-11).

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[12] In *Austin* v. *Pennsylvania Ry. Co.*, 82 N. J. L. 416 (E. & A. 1911), Justice Swayze said:

> "All that is required is that the circumstances should be so strong that a jury might properly, on ground of probability, rather than of certainty, exclude the inference favorable to the defendant. The question arises only where the evidence is circumstantial, and where probability may be all that is attainable."

To have the quality of negligence, human action or non-action does not have to be in the light of absolute knowledge that another will be injured thereby.

See: *Texas & P. Ry. Co.* v. *Mix*, 193 S. W. R. 2nd 542.

[13] See: *B. C. & A. Ry. Co.* v. *Turner*, 152 Md. 228, 136 A. 609 (1927); *Dickey* v. *Hochschild Korn & Co.*, 157 Md. 450, 146 A. 282 (1929); *Benedick* v. *Plotts*, 88 Md. 52, 40 A. 1067 (1898); *Jackson* v. *Pa. R. R. Co.*, 3 A. 2nd 719 (Md. E. & A. 1939).

Such violation constituted negligence.[14]

The train was started at the suggestion of James O'Donnell, who could not and did not see 6 to 8 cars (P66a-1). The train was composed of 48 cars (P16a-17).

Joseph Smith, the Yard supervisor, testified in answer to the question as to whether he heard the bell rung, that he couldn't say whether he heard the bell rung (P23a-9), but he heard the whistle (P23a-22).

The presumption of decedent's due care for his own safety exists as a matter of law. See: *Tennant* v. *Peoria & P. U. Ry, Co., supra.*

> "Evidence that railroad employee was killed approximately at point where engine, in violation of railroad rule, commenced backward movement without warning and where employee might properly have been together with presumption that employee was engaged in performance of his duties and exercised due care for his own safety, was sufficient to authorize jury finding that negligence of railroad was proximate cause of employee's death. Federal Employers' Liability Act, Sec. 1 et seq., as amended, 45 U. S. C. A. Sec. 51 et seq."

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[14] The identical situation was held to constitute liability by the United States Supreme Court in the case of *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944), and also by the Court of Appeals, Third Circuit, in the case of *Eiseman* v. *Pennsylvania R. Co.*, 151 Fed. Rep. 2nd 222 (3 C. C. A. 1945).

In the *Tennant* case, *supra*, the defendant's rule which was violated referred to bell signals as does Rule 30 of the defendant which provides as follows:

> "30. The engine bell must be rung when an engine is about to move, when running through tunnels, while approaching and passing public crossings at grade, passenger stations and when passing trains standing on adjacent tracks, including yard tracks."

> "35. The following signals will be used by flagmen: Night signals—A red light, a white light, torpedoes and fuses."

POINT III

Petitioner was denied both her constitutional right to a jury trial and due process of law.

This denial of due process of law seems to be indicated by the following:

The Court below barred any testimony as to a generally accepted standard of care and, for that matter, any evidence as to the standard of care established by the respondent itself.

During the testimony of John T. Van Orman, General Car Foreman, the Court sustained objections to the following questions (P105a-12):

> "Q. Did you make any provision to have the blue light displayed while the air hose was being coupled?
>
> Mr. Broadhurst: I object to that.
> The Court: Objection sustained."

(P111a-12):

> "Q. Isn't it a fact you had a rule which I believe you personally promulgated in accordance with the rules of all railroads, that an air slip should be given to the engineer?
>
> Mr. Broadhurst: I object to that question.
> The Court: Sustained."

During the testimony of John P. Hann, Engineer, the Court sustained objections to the following questions (P97a-15):

> "Mr. Rassner: Then I make the tender of proof that there is an established usage and custom

throughout the United States before any train engineer pulls his train out of the yard, he must get an air slip from the chief inspector, and until he gets that slip he may not move the train at all out of the yard.

Mr. Broadhurst: I object to the tender of proof, if your Honor please. We are dealing with the operation of a specific railroad under its rules and regulations of that railroad. What is done elsewhere, if it is in fact done—

Mr. Rassner: I make the tender of proof, and I say that is the law.

The Court: I understand. Sustain the objection."

During the testimony of Jesse A. Kerby, called as an expert witness on behalf of the plaintiff the Court sustained an objection to the following question (P116a-5):

"Q. Can you tell us, based on your experience of some 40 odd years, whether on January 13, 1951, there was established usage and custom universal with all railroads, including the Lehigh Valley Railroad, that is all A-1 Railroads in the United States, specifying the manner of a formation of car inspectors giving information upon which a train is moved out of a yard after the cars are assembled? Yes or no.

Mr. Broadhurst: If your Honor please—
The Court: Sustain the objection."

In the case of *Wilkerson* v. *McCarthy, et al.*, 336 U. S. 53 (1949), the Supreme Court was quite concerned with

whether the railroad lived up to the standard of care commensurate to the dangers of the business.[15]

A safe place to work, adequate lookouts and warning, the surrounding facts and circumstances and the custom and practice with reference to railroad operation have always been considered as constituting factual issues exclusively within the province of the jury to decide.

In the case of *Boston & Maine R. R.* v. *Meech*, 156 F. 2d 109 (C. C. A. 1st 1946), the Court of Appeals for the First Circuit held that the failure to provide precaution of a lookout and adequate whistle signals constituted negligence.

Said Court further held that the question of whether the surrounding circumstances provided the deceased employee with a reasonably safe place wherein to work was a question of fact for the jury.

In the *Tennant* case, *supra*, it was quite apparent that where it appeared that a locomotive had remained stationary for some minutes and then started, that the question of the company's own written rules, as well as the general practice and custom also as to the ringing of an engine bell, were all material matters.

The Court below erroneously refused to permit the presumption that the decedent exercised due care for his own safety at the time of his death, in spite of such holding in the *Tennant* case, *supra*.

The Court below erroneously searched the record for conflicting circumstantial evidence in order to take the case

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[15] In the case of *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649 (1947), the question of adequate warning was held to be of basic importance. The fact that there was conflicting evidence was held not to be justification for the Court taking the case from the jury. The custom of the trade was likewise held to be an important factor.

The ability of the engineer to see or have other knowledge or information of the surrounding circumstances were also submitted as material factual questions.

away from the jury, when such procedure was specifically held to be erroneous by the Supreme Court of the United States in the *Tennant* case, *supra*.

In the case of *Eiseman* v. *Pa. R. Co., supra,* it was held that a witness who testified that he did not hear a bell ringing on the locomotive which struck plaintiff's decedent was in a position where "in all probability" he would have heard a bell signal if one had been given. Witness' testimony was more than "negative evidence" and presented question for jury on the issue of giving bell signal.

The law is clear that on a motion to direct a verdict for the defendant every fact in evidence and every reasonable inference therefrom in favor of the plaintiff is admitted by the defendant.

> *Hellweg* v. *Telephone Co.,* 110 F. 2d 546 (C. A. D. C., 1940);
> *McKinney* v. *Public Service,* 4 N. J. 229 (1950);
> *Sokol* v. *Liebstein,* 9 N. J. 93, 98 (1952).

In the case of *Howard* v. *Louisiana & A. Ry. Co.,* 49 F. 2d 571 (C. C. A. 5th, 1931), the Court stated on page 574:

> "This state of the evidence requires that the issues of fact raised upon conflicting testimony 'shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative'."

In the case of *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521 (1924), the Court stated on page 524:

> "The credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury and not by the judge."

As early as 1830, in the case *Parsons* v. *Bedford*, 3 Pet. 433, 1830, 28 U. S. 433, the Court laid down a principle of law which has consistently been followed by all the Courts of this country, and which principle was reiterated in the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, wherein the Court stated on page 378 as follows:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

Said Court further stated, on page 378, quoting from the case of *Walker* v. *New Mexico & c. Railroad Co.*, 165 U. S. 593:

> "This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."

In the case of *Johnson* v. *Dierks Lumber & Coal Co.*, 130 F. 2nd 115 (C. C. A. 8th, 1942), the Court stated on page 119:

> "Moreover, where reasonable men may draw different inferences from the evidence, it is the province of the jury to determine which is proper."

The Court in *Fratta* v. *Grace Line*, 139 F. (2d) 743, 744 (C. C. A. 2nd, 1943) stated as follows:

> "We take this occasion to suggest to trial judges that, generally speaking—although there may be exceptions—it is desirable not to direct a verdict at the close of the evidence, but to reserve decision on any motion therefor and allow the jury to bring in a verdict; the trial judge may then, if he thinks it improper, set aside the verdict as against the weight

of the evidence and grant the motion, Federal Rules of Civil Procedure, rule 50 (b), 28 U. S. C. A. following section 723c, with the consequence that if, on appeal, we disagree with him, we will be in a position to reinstate the verdict, thus avoiding the waste and expense of another trial. Reversed."

As late as January 31, 1949, in the case of *Wilkerson* v. *McCarthy*, 336 U. S. 53, 62, 63:

> "Moreover, this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence; 'We see no reason, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 U. S. 443, 445, 32 L. ed. 478, 480, 9 S. Ct. 118. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fairminded men may draw different inferences.' Washington & G. R. Co. v. McDade, 135 U. S. 554, 572, 34 L. ed. 235, 241, 10 S. Ct. 1044. Such has ever since been the established rule for trial and appellate courts. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 87 L. ed. 610, 617, 618, 63 S. Ct. 444, 143 A. L. R. 967. Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this Court, speaking through Mr. Justice Holmes, said: 'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved.' Aikens v. Wisconsin, 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 S. Ct. 3."

See:

Jacob v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854 (1942).

The Supreme Court of the United States felt that the provisions of the Seventh Amendment to the Constitution which guarantees to all litigants the right to trial by jury required all cases involving railway employees to be submitted to a jury . . . its determination, prior to the enactment of the Federal Employers' Liability Act, *supra*. The enactment of this Act did not constitute an unrestricted power to a Trial Court to take from the jury unto itself the prerogative of deciding factual issues.[16]

The inference that Shellhammer was killed while in the act of changing a defective air hose in the brake system, was a matter to be accepted or rejected by a jury. The Trial Court was in error in deciding such question of fact.

See:

Lukon v. *Pennsylvania R. R. Co., supra.*[17]

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[16] *Jacob* v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942); *Wolf* v. *Chicago, M. St. P. & Pac. R. Co.*, 180 Minn. 310, 230 N. W. 826 (1930); *Chesapeake & Ohio R. Co.* v. *Winder*, 23 F. (2d) 794 (C. C. A. 4, 1928); *Wilson* v. *Director General of Railroads*, 95 N. J. L. 482, 112 A. 732 (1921) certiorari denied 256 U. S. 700, 41 S. Ct. 538, 65 L. Ed. 1178 (1921); *Norfolk & W. R. Co.* v. *Earnest*, 229 U. S. 114, 33 S. Ct. 654, 57 L. Ed. 1096 (1913); *Dutton* v. *Atlantic Coast Line R. Co.*, 104 S. Ct. 16, 88 S. E. 263 (1916) affirmed 245 U. S. 637, 38 S. Ct. 191, 62 L. Ed. 525 (1918); *Union Pac. R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751 (1918).

[17] Where a trainman was found dead beside the railroad tracks, probably from a blow on the head, and where coal was found on his cap and a coal car had recently passed that spot, it was within the province of the jury to infer that a piece of coal fell off the car striking him fatally.

The importance of trial by jury cannot be over emphasized nor the denial of said constitutional right be permitted to go unchallenged.[18]

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[18] *O'Donnell* v. *Elgin J. & E. Ry. Co., supra*:

"We need not resolve the conflict between these competing theories of causation, for that decision was for the jury. Ellis v. Union Pacific R. Co., 329 U. S. 649, 653, 67 S. Ct. 598, 600, 91 L. Ed. 572."

Williams v. *N. Y. Central R. Co., supra*, citing the cases of *Tiller* v. *Atlantic Coast Line R. Co.*, 63 S. Ct. 444, 318 U. S. 54; *Bailey* v. *Central Vermont Ry., Inc.*, 63 S. Ct. 1062, 319 U. S. 350; *Tennant* v. *Peoria & P. U. Ry. Co.*, 64 S. Ct. 409, 321 U. S. 29; *Lavender* v. *Kurn*, 66 S. Ct. 740, 327 U. S. 645; *Jesionowsky* v. *Boston & M. R. R.*, 67 S. Ct. 401, 329 U. S. 452; *Ellis* v. *Union Pac. R. Co.*, 67 S. Ct. 598, 329 U. S. 649; stated:

"In actions under the Federal Employers' Liability Act the rule for measuring the sufficiency and amount of evidence necessary to justify the submission of the case to the jury is that established by the Supreme Court of the United States * * * and it is clear from its recent decisions that the authority of courts to withdraw from the consideration of a jury the question of a defendant railroad company's negligence and its proximate relation to the injury is now very restricted." Page 506.

Lukon v. *Pennsylvania R. Co., supra.*

"Although there was no witness who actually saw Lukon struck, there was ample circumstantial evidence to indicate how he was injured. Such evidence has probative value equal to that of testimonial evidence. Wigmore on Evidence, Third Edition, Section 36."

Lavender v. *Kurn*, 66 S. Ct. 740, 327 U. S. 645 held:

"Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

Cited with approval in *Casey* v. *American Export Lines Inc.*, 173 Fed. 2d 324, reversed on other grounds.

Mr. Justice Butler declared in the case of *Jamison* v. *Encarnacion, supra*:

> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by courts, and within the word as ordinarily used."

The proof in the case at bar seems to come squarely within the four corners of the principal of law as enunciated repeatedly by this Court as requiring the submission of such instant case to the jury.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL M. COLE,
Attorney for Petitioner.

JACOB RASSNER,
of Counsel.

Jones v. *East Tennessee, Virginia, Georgia R. Co.*, 9 S. Ct. 118, 128 U. S. 443:

> "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these (negligence, etc.) as well as others."

Missouri-Kansas-Texas R. Co. v. *Evans*, 250 S. W. 2nd 385:

> "The Federal cases hold that this matter of causation must be submitted to the jury unless there is a complete absence of probative facts to support the jury's finding (p. 391).

APPENDIX

(Opinion of Supreme Court)

Argued November 30, 1953—Decided January 25, 1954.

On certified appeal from the Appellate Division of the Superior Court.

Mr. Louis J. Greenberg argued the cause for the appellant. Mr. Samuel M. Cole, Attorney.

Mr. Charles W. Broadhurst argued the cause for the respondent. Messrs. Emory, Langan & Lamb, Attorneys.

The opinion of the Court was delivered by

Heher, *J.*

On January 13, 1951 the deceased Walter R. Shellhammer suffered fatal injuries while pursuing his employment in interstate commerce with the defendant railroad; and, asserting actionable negligence under the Federal Employers' Liability Act, 35 *Stat.* 65, 36 *Stat.* 291, 53 *Stat.* 1404, 45 *U. S. C., sec.* 51, *et seq.*, recovery is sought in this proceeding of the pecuniary loss sustained by the widow and next of kin of the deceased.

There was a judgment of dismissal at the close of plaintiff's case, for want of proof of a negligent failure of duty as the proximate cause of the fatality; and the Appellate Division of the Superior Court affirmed the consequent judgment. We certified the cause for appeal on plaintiff's motion.

The deceased was a foreman of car inspectors and repairers. His particular assignment involved the assembling of three groups of freight cars into a single train, in the railroad's Jersey City freight yard, for movement to Oak Island, eleven miles away. The last of the cars were coupled, the air hose connected and the valves opened by two car inspectors under the deceased's immediate super-

vision, and the operating test was then made preliminary to setting the train in motion. The test was satisfactory; and, after building up a reserve of air pressure, a matter of a very few minutes at the most, the engineman blew the engine whistle to indicate he was ready to move, whereupon the conductor gave the engineman the starting signal, and the train was put into motion, the engineman the while ringing the engine bell, and the train moved out of the yard. Shortly thereafter, the decapitated body of Shellhammer was found between the rails of the track, the arms at shoulder level and the left hand gloved.

The contention is that the train was moved without adequate warning while Shellhammer was yet engaged in replacing a defective air hose lately discovered between the two cars of the train. A length of air hose was found a short distance from the body; and it is theorized that after the two car inspectors "had concluded their work, given the all-clear signal and left, Shellhammer observed that a leak had sprung in the hose between the 23rd and 24th cars", and he "thereupon put on his work gloves, shut off the air supply, replaced the defective hose with a good one, threw the defective hose on the ground where it was subsequently found and just as he turned the angle cock to turn the air on, the train started and killed him." The ordinary presumption of due care by the deceased for his own safety is invoked.

The question is whether there is evidence to sustain this hypothesis of negligence. Appellant's insistence is that defendant's employees knew, or in the exercise of reasonable care, should have known, that Shellhammer "was in the vicinity of the train," and that "a leak in an air hose or any defect, for that matter, might present itself at any moment," and "a conscientious employee like Shellhammer would take steps to remedy such a situation," and under the statute "the jury is the appropriate tribunal to determine the questions of reasonable care and proximate cause."

But, if there is to be a submission to the jury, there must of necessity be a sufficient showing of negligence, if the evidence be accredited, to sustain the pleaded cause of action. Liability under the Act arises from negligence causing injury, and not from the injury itself. The common-law concept of negligence is embodied in the Federal statute. The question is what a reasonable and prudent person would have done under the circumstances; and, where fair-minded men would differ on that, the issue goes to the trier of the facts. *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407, 73 S. Ct. 358, 97 L. ed. 441 (1953). And the injury must perforce be the natural and probable consequence of the negligence or wrongful act, such as ought to have been foreseen in the light of the attending circumstances. Events "too remote to require reasonable prevision need not be anticipated." *Brady* v. *Southern R. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. ed. 239 (1943). The burden of proving negligence and proximate cause rests upon the plaintiff; "mere speculation" is not enough; the question is whether there are probative facts reasonably justifying the inference of fault and proximate cause, and when such is the case it is for the jury to determine whether that inference ought to be drawn. *Tennant* v. *Peoria and Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. ed. 520 (1944); *Moore* v. *Chesapeake & Ohio Railway Co.*, 340 U. S. 573, 71 S. Ct. 428, 95 L. ed. 547 (1951). Since the right of action comes by a federal statute, under the Supremacy Clause of the Federal Constitution, *Article* VI, the State courts must conform. The sufficiency of the evidence in this regard is a federal question reviewable by the Federal Supreme Court, to insure the authority of the Act in the State courts. There must be more than a scintilla before a factual issue is raised for the jury. When the evidence is such that, without weighing the credibility of the witnesses, the absence of negligence is the only reasonable conclusion, there is no issue for the jury. *Brady* v. *Southern R. Co.*, cited *supra*.

Such is the rule in the judicial administration of New Jersey's negligence law, derived as it is from the common law. The scintilla rule does not obtain here. The question is whether the trier of the facts could, on any reasonable view of the evidence, rejecting all evidence and inferences unfavorable to the plaintiff, find that the plaintiff had established the facts essential to his asserted cause of action. Is there any evidence which, if accepted and given its fullest probative force, reasonably tends to sustain the pleaded cause of action? Mere surmise or conjecture is not enough. *Sivak* v. *New Brunswick*, 122 N. J. L. 197 (E. & A. 1939). This is the English common-law rule. Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain? *Bridges* v. *The Directors, etc. of the North Linden Railway Co.*, L. R. 7 H. L. 213.

So assessed, the evidence here does not make for a factual inquiry by the jury.

The coupling of the cars had been completed, the air-brake operating test had been made, and the train was ready to proceed. There was every reason to believe, when the moving signal was given, that the deceased and his air inspectors had finished their work and had departed from the scene. So far as appears, there was due circumspection in this regard. When the air-brake test proved satisfactory, one of deceased's inspectors, in his own presence, called out to the trainman nearby that "the train is all yours," meaning, it is conceded, that it was in readiness to go, and the deceased then said, "Good night, I will see you next week."

There is no tangible evidential basis for the inference that the apparently discarded piece of air hose found nearby was connected with the deceased's operations. His work was supervisory; but, conceding the possibility of a sudden emergency, the wrench which it is acknowledged was an indispensable tool in the replacement of an air hose

was nowhere to be found; nor was there a lantern, the hour being 8:20 P. M. And the deceased did not conform to the established rule, for the worker's own protection, that when emergency repair work is to be done under such circumstances, a signal shall be given to the engineman and fireman. No such signal was given. In a word, there was no reason whatever to anticipate the deceased's presence in a place of danger when the train was put into operation; quite the contrary.

Indeed, in the final analysis, the specific ground of negligence asserted on the brief is that it is shown by "uncontradicted evidence" that "an interval of 15 to 20 minutes had elapsed between the all-clear signal, followed by the air-brake test, which took thirty seconds; and the actual starting of the train by Hann, the defendant's engineer;" that "no one was assigned to check up and take any steps to ascertain if a change of status had occurred during that 15 to 20 minute interval during which no check-up or investigation had been made to prove it was safe to start the train," "as to whether or not the decedent or anyone else was working at or about the train or between the cars," and the "engineer started the train relying solely on an all-clear signal which had been given to him 15 to 20 minutes earlier."

The Court's preargument examination of the record revealed no ground whatever for the statement that between 15 to 20 minutes intervened between the giving of the all-clear signal and the movement of the train; and on the oral argument, when counsel was asked to point out the evidential justification for this factual assertion, he was unable to do so and then agreed that it had no basis in the record. In ostensible support of this affirmation of fact, the brief cites evidence tending to show that there was an interval of 15 minutes between "the time of the last coupling" of cars "until the time the train moved out of the yard, started to move," a radically different thing. Thus, the basic factor in the charge of negligence made on

the brief is not sustained by the proofs. The train went into timely motion in accordance with the only signal given; there was no interval calling for a renewal of the signal before the train was actually put into operation. A finding of culpable negligence in these circumstances would be purely conjectural and utterly devoid of the factual substance requisite for liability under the statute.

Affirmed.

A true copy.

JOHN H. GILDEA
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM—1953

No. 727

KATHERINE SHELLHAMMER, General Administratrix of the Estate of WALTER R. SHELLHAMMER, deceased,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, a corporation,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Appellate Division of the Superior Court of New Jersey (P142a *et seq.*) has not been officially reported. The opinion of the New Jersey Supreme Court granting Certification is reported at 13 N. J. 291 and its opinion affirming the Appellate Division, is reported at 14 N. J. 341.

Jurisdiction

The petitioner invokes the jurisdiction of this Court under Title 28 U. S. C. Section 1254 (Pb1). This Sec-

tion relates solely to the review of judgments of the Courts of Appeals. This Court does have jurisdiction, however, under Title 28 U. S. C. Section 1257 (3) and Rule 38, par. 5 (a) if a state court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court. Respondent assumes this is the basis of the jurisdiction that petitioner in fact, relies upon.

Question Presented

This action was brought under the Federal Employers' Liability Act (U. S. C. Title 45, Sections 51 *et seq.*) in the Superior Court of New Jersey (P1a). It was tried October 21st to 28th, 1952 and at the conclusion of the evidence, the trial Court granted a motion for judgment in favor of the respondent (P8a). Petitioner appealed to the Appellate Division of the Superior Court (P9a) and urged a reversal of the judgment on two grounds. The first ground was for alleged error in not submitting the case to the jury and the second ground was for various alleged errors in the exclusion of certain testimony (P145a-10 to 20; P149a-5 to 20). The Appellate Division, by a unanimous decision, affirmed the action of the trial Court in all respects. The petitioner then applied to the New Jersey Supreme Court for leave to review the Appellate Division's holding that the trial judge did not err in not submitting the case to the jury. The Supreme Court of New Jersey granted petitioner the right of review. The sole question urged before, considered by or decided by the New Jersey Supreme Court, was whether the courts below had correctly held that the petitioner had failed to prove that a negligent failure of duty on the part of the respondent was the proximate cause of the fatality (Appendix to Petitioner's br. p. 26).

The sole question presented on this application is whether this Court will grant its discretionary writ to bring the record here for a third judicial examination of the proof in

order to determine whether there was any evidence established which warranted the question of liability being submitted to the jury.

Statement of the Case

The plaintiff's intestate, hereinafter referred to as "Shellhammer" was an employee of the defendant railroad. It was stipulated that the Federal Employer's Liability Act applied to the case and that Shellhammer's death on January 13, 1951, was due to decapitation (P11a-1). The plaintiff, who had called all the witnesses known to have any knowledge of the occurrence, established the following facts.

The occurrence took place in a freight yard located in Jersey City, New Jersey, that was owned and operated by the defendant. The easterly end of this yard abutted on the Hudson River. At this point there were float bridges used as a means in loading and unloading freight cars on and off car floats. Johnston Avenue bounded the yard on the southerly side. The Morris Canal Basin was the northerly boundary. At a point west of the Hudson River, Washington Street, which was a dirt roadway, extended from Johnston Avenue across the tracks of the defendant's yard to the Morris Canal Basin. This yard was used as a place to group, according to destination, the various freight cars arriving from the car floats. It contained a number of tracks but the particular tracks referred to by the witnesses, all ran east and west and starting from the southerly side were called "Lower East Bound", "Lower West Bound", "1 Dock", "2 Dock", "3 Dock" and "4 Dock".

During the course of the day of January 13, 1951, several yard engines, with their respective crews, assembled three groups of cars totaling forty-eight cars in all. There were fourteen cars on Track 1 Dock east of Washington Street. There were six cars on Track 3 Dock west of Washington

Street and twenty-eight cars on Track 3 Dock east of Washington Street (D15a-10). There were no cars on the other tracks mentioned above (D29a-30).

The cars in each of the three groups had been coupled together and the air hoses connected. The train crews had done the coupling of the cars and two car inspectors, "Gumhold" and "Helmstetter" had connected the air hoses (D42a-15). Gumhold and Helmstetter were the subordinates of Shellhammer who was employed by the defendant as foreman of car inspectors and repairers (D16a-30). The three groups of cars were to be assembled into a single train, designated as "JS1 & JB1" and taken to Oak Island which is located about eleven miles west of the yard in Jersey City.

The engine and crew which was to assemble the three groups of cars into a single train was designated as a "pullout" (D6a-30). The crew consisted of Luther H. Schumacher, the foreman or conductor, James P. O'Donnell, a trainman, Gerald O'Hara, a trainman, John P. Hann, the engineer and a fireman.

Shellhammer had arrived at the office of yardmaster, Joseph F. Smith at about 7:30 P.M. (P17a-20). This office was located about 300 feet north of the tracks in question and west of Washington Street (P13a-10). Shellhammer's duties were solely of a supervisory nature. He performed no actual labor himself but directed his subordinates, the car inspectors and car repairers, as to whatever work should be done. His presence in this yard was to see that train "JS1 & JB1" left the yard on time (D16a-30).

About 8:00 P.M. on the night in question, the "pullout", which then consisted of a diesel engine headed east with a caboose attached to its rear or west end, moved easterly along Track 1 Dock and stopped with its front end at the west side of Washington Street (D32a-25). Conductor Schumacher and trainmen, O'Donnell and O'Hara, alighted

from the caboose. Schumacher walked in a northerly direction to the yardmaster's office (D7a-20). O'Donnell walked across Washington Street and continued easterly along the south side of the fourteen cars that were standing east of Washington Street on Track 1 Dock (D32a-30). He then crossed over Tracks 1 Dock and 2 Dock and proceeded to walk along the southerly side of the twenty-eight cars that were standing on Track 3 Dock (D32a-35). He placed a red lantern on the most easterly of these cars as this would be the rear end of the train when it left the yard (D32a-40). Trainman O'Hara walked across Washington Street to the westerly end of the fourteen cars on Track 1 Dock and assisted in making the coupling of these cars to the engine (D7a-30). The caboose, engine and the fourteen cars then moved west until the easterly end of the fourteen cars passed beyond a switch which would permit the train to be backed easterly into Track 3 Dock (D8a-10). During this movement, trainman O'Hara rode on the train so as to be the nearest man to engineer Hann and be able to relay signals to him (D39a-20). Conductor Schumacher who in the meantime had returned from the yardmaster's office, took a position near the switch for Track 3 Dock. The caboose, engine and fourteen cars then moved east from Track 1 Dock into Track 3 Dock. When the six cars standing on Track 3 Dock west of Washington Street were reached, they were coupled to the east end of the fourteen cars (D9a-10). The caboose, engine and twenty cars then continued easterly on Track 3 Dock in order to couple on to the twenty-eight cars standing on that track east of Washington Street (D9a-15). The westerly end of these cars was about three feet from the easterly edge of Washington Street (D10a-15). Trainman O'Donnell who by this time had completed his inspection of the twenty-eight cars standing on Track 3 Dock, had returned to Washington Street prepared to make the final coupling (D34a-1).

About the time the train movements described above were completed, Shellhammer and his car inspectors, Gum-

hold and Helmstetter, were on Washington Street (D16a-35). Shellhammer and Gumhold were on the south side and Helmstetter on the north side of Track 3 Dock (D17a-10). The caboose, engine and twenty cars were moved easterly and trainman O'Donnell coupled them to the twenty-eight cars standing east of Washington Street (D34a-1). Then Gumhold, on the south side and Helmstetter on the north side at the point where this last coupling had been made, connected the air hoses and opened the air valves. At this time Shellhammer was standing in back of Gumhold (D17a-10).

It was necessary to make a practical or operating test of the air brakes before the train departed (D19a-35). In order to relay the necessary signals for this test, trainman O'Hara had taken a position on the ground seven or eight cars east of the engine (D40a-10). Conductor Schumacher took a position east of O'Hara (D40a-5) and trainman O'Donnell took a position about four or five cars west of Washington Street (D11a-20). They were all on the south side of the train as was Gumhold and Shellhammer. Gumhold, by signal given with his lamp, requested that the air brakes be applied by the engineer (D17a-28). This signal was relayed by the trainman to the engineer and he applied the air brakes (D40a-15). Gumhold then gave the necessary signal by lamp to have the engineer release the air brakes and this signal, in turn, was conveyed to the engineer who released the air brakes (D18a-15). Gumhold observing that the air brakes had worked properly on the test, hollered out to trainman O'Donnell, who was a number of cars west of him, "Jimmy, the train is all yours" (D18a-20). Shellhammer who was standing in back of him then said to Gumhold "Good night, I will see you next week" (D18a-25). Gumhold then proceeded to cross over the cars from the south to the north side (D18a-30). Helmstetter who was on the north side left as soon as the train started in motion (D44a-30). O'Donnell walked westerly to the point where he met conductor Schumacher and they

then both walked westerly toward the caboose (D36a-15). When they reached the engine which they had to pass to get to the caboose, conductor Schumacher said to engineer Hann, "We're ready to go whenever you're ready" (D36a-30). Schumacher and O'Donnell then entered the caboose. O'Hara had already entered the caboose. Due to the fact that in the making of the air brake test some of the reserve of air on the engine had been depleted, it was necessary for engineer Hann to wait a few minutes until the air reserve had been replenished (D46a-40). When this reserve had been replenished, he blew his engine whistle indicating that he was ready to move (D48a-5) and thereupon conductor Schumacher told O'Hara to give the engineer the signal to start. O'Hara went to the rear end of the caboose and gave a hand signal to the engineer to move (D40a-25). Engineer Hann then started his engine bell ringing (D48a-15) and proceeded to move westerly out of the yard.

Shortly after the train "JS1 & JB1" had departed, an engine and crew that had been working west of Washington Street and was waiting for train "JS1 & JB1" to leave the yard, moved easterly on Track 4 Dock. This engine had attached to its easterly end what is known as a pusher car and trainman Kobal was riding on the easterly end of that pusher car. As he approached Washington Street, he observed what he thought was a body and upon further and closer inspection, this turned out to be the body of Shellhammer (P53a-15). Shellhammer's body was found at a point about two car lengths east of Washington Street (D20a-10). It was flat on its back with the feet pointed almost directly in a southerly direction and crossed one over the other (D25a-20). The head had been completely severed from the body and lay north of the south rail of Track 3 Dock (D25a-10). The shoulders were close to the south side of the south rail of Track 3 Dock (D25a-30). The arms were at shoulder level. The right hand was bare and the left hand had a glove (D26a-30). There were

no tools at or near the body (D28a-1). Word having been forwarded to Oak Island of the finding of Shellhammer's body, an inspection was made of the cars of the train immediately upon its arrival at that point. That inspection showed that there were no defects of any kind found in the train and the first mark of blood was on the second wheel from the front end of the twenty-fourth car in the train (D45a-20).

ARGUMENT

I.

The New Jersey Supreme Court did not err in affirming the action of the Courts below in entering judgment for the respondent.

The Federal Employers' Liability Act is not a Workmen's Compensation Law and in order to be entitled to a verdict, a suitor must prove that the defendant was negligent.

Wilkerson v. *McCarthy*, 336 U. S. 53, 61 (Jan. 1949).

The weight of the evidence under this Act must be more than a mere scintilla before the case may be properly left to the discretion of the trier of the fact, in this case, the jury.

Brady, Admx. v. *So. Ry. Co.*, 320 U. S. 476, 479 (December, 1943) and cases cited therein.

The measure of the defendant's duty is reasonable care having regard to the circumstances. The term "negligence" contained in this Statute had been defined by this Court to be the failure to do what a reasonable and prudent person should ordinarily have done under the circumstances.

Mo. Pac. R. R. Co. v. *Aldy*, 275 U. S. 426, 430 (1928).

In the petitioner's brief (Pb8-3) it is stated that "These facts justify the inference that after the two car inspectors had concluded the work, given the 'Okay' signal and left, that Shellhammer observed that a leak had sprung in the hose between the 23rd and 24th cars; that he thereupon put on his work gloves, shut off the air supply, replaced the defective hose with a good one, threw the defective hose on the ground where it was subsequently found and just as he turned the angle cock to turn the air on, the train started and killed him". The numerous inferences, one upon the other, that the petitioner seeks to draw, are all predicated on the fact that the witness, Kobal, testified to seeing an air hose lying on the ground two or three feet south of the decedent's feet.

Kobal testified that he saw an air hose lying along Track 2 Dock (D28a-10). It was about six or seven inches from the north rail of track 2 dock and two or three feet away from the feet of decedent as he lay on the ground (D28a-20). The distance between the south rail of track 3 dock and the north rail of track 2 dock was about 12 feet (P55a-20). The decedent was about 5'8" in height and his shoulders were close to the south rail of track 3 dock (D26a-5). While it is true that several witnesses were asked whether they had observed this hose before the decedent's body was found and they testified that they had not observed it, nevertheless, there was no proof as to how this air hose got at the point described or how long it had been there.

The proof negatived the inference that the decedent had put the air hose there after removing it from between the 23rd and 24th cars. In the first place, car inspector Helmstetter testified that after the engineer had tested the air brakes by applying and releasing them, he stood on the north side of the train just east of Washington Street, and about 15 feet from it until the train started in motion (D44a-25). If an air hose had burst, he was close enough to have heard it and he heard nothing (D45a-10). That

the supply of new air hoses was kept in a shanty near the Yardmaster's office which would be on the north side of the train (P79a-30). That the inspectors do not carry them with them while making their inspections (P80a-20). That to replace an air hose it is necessary to use a wrench (P80a-25; P81a-15). That decedent would not change an air hose personally but would have his car inspectors make the change (P81a-28).

Car Inspector Gumhold, who was the last one to see and speak with the decedent testified that after the air test had been made by the engineer and he had turned the train over to the train crew, decedent said to him "Good night. I will see you next week" (D18a-25). That decedent did not have any tools or lantern with him (D16a-25). There were no tools or lantern found near the decedent's body (D28a-1). An air hose is about 25 to 30 inches in length and 1¾ inches in diameter (P21a-35). It is permanently connected to each end of each car near the center and anyone working on it would therefore be standing between the cars and not lying on his back on the ground, as was the decedent (P40a-25).

The signs of physical injury to the body of decedent were inconsistent with the inference that he was standing between the 23rd and 24th car and was knocked down and run over. Dr. Hernandez, Deputy County Physician, who examined the body, testified that there were no injuries to the head or face, or to the shoulders, body or extremities. The only sign of injury was the complete severing of head, through the neck (D14a-1).

We respectfully submit that in view of all of the testimony introduced by the plaintiff, not only was there no justifiable inference that the decedent was killed while in the act of replacing a defective air hose but that the reasonable inferences exclude that idea.

On the question of the defendant's negligence, the plaintiff argues that the defendant's employees in the exercise of reasonable care should have anticipated that the deced-

ent might be between the cars changing an air hose and therefore should not have moved the train without going back over the forty-eight cars to make certain that the decedent was not so engaged (Pb15). This overlooks the fact that the undisputed proof in the case showed that decedent stood on Washington Street behind his car inspector, Gumhold, and of necessity heard Gumhold call to trainman O'Donnell "Jimmy, the train is all yours" (D18a-20). The plaintiff offered in evidence the Book of Rules covering the specific situation that existed (D97a, Exh. P-1). Rule 815 (D97a-35) specifically provides that foremen of car inspectors, such as the decedent, were under a duty of "protecting themselves as prescribed by Rule 26 while inspecting or repairing cars". Rule 26 known as the Blue Flag Rule specifically provided for the respective duties of car inspectors and train crews in order to prevent car inspectors from being injured by the movement of trains while they were engaged in their work. That Rule not only cast a duty upon the decedent but as a corollary, gave the train crew the right to assume that the decedent would comply with the rule. The Rule specifically provided:

> "When emergency repair work is to be done under or about cars *in a train* and a blue signal is not available, *the engineman* and fireman will be notified and protection must be given those in making a repair.
>
> "When a blue signal is placed at one or both ends of a car to *which an engine* is attached, *the engineman* and fireman *must be notified.* They must also be notified when a blue signal is removed." (Italics ours.) (D97a-15)

The proof is undisputed that at no time was Engineer Hann notified by the decedent or anyone else of any work to be done by the decedent and no blue flag was placed on his engine (D47a-10 to 40). In the absence of the decedent placing a blue flag on the engine and notifying Engineer Hann, it is not reasonable to accept the plaintiff's contention that the employees of this train should, in the

exercise of reasonable care, have anticipated that the decedent after the train had been turned over to the train crew would attempt to make any emergency repairs without complying with Rule 26, the very purpose of which was to provide protection in making of such emergency repairs.

It is asserted, in the petitioner's brief, that the respondent was liable because there was proof that the respondent violated the Safety Appliance Act and that such violation was the proximate cause of the fatality (Pb6). The specific provision of the act, which it is claimed was violated, is said to be the one prohibiting the use on its line of any locomotive engine "not equipped with a power driving wheel brake and appliances for operating the train brake system," or to run any train "that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakeman to use the common hand brake for that purpose" (Pb8). This is the first time in any Court that such contention has been made. No reference is made to any proof in the record to substantiate this claim. There is no such proof. In fact, as we have shown in the Statement of the Case, *supra*, the undisputed proof showed that the airbrake system of the train was tested in the presence and under the supervision of the decedent and was found to be in order. After the accident when the train arrived at its destination, nine miles away it was again inspected and found to be in good order.

It is asserted in the petitioner's brief (Pb15) that the engineer of the train was "guilty of further fault in violating its own rule (Rule 30), which provides for the ringing of a bell when the engine is about to move." The proof adduced by the petitioner clearly showed that the engine bell was rung, as required by the rule, before the train started. Engineer Hann testified that before he started the train he started the engine bell ringing (D48a-1 to 20).

This Court in *Brady, Admx.* v. *Southern Railway Co.*, 320 U. S. 476 (Dec. 1943) laid down the following principles of law as being controlling in actions under the Federal Employers' Liability Act:

1. "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury." (p. 479)

2. "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." (p. 480)

3. "The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause. * * * Bare possibility is not sufficient. *Milwaukee & St. Paul Ry. Co.* v. *Kellogg*, 94 U. S. 469, at 475:

" 'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'

"Events too remote to require reasonable provision need not be anticipated. It was so held as to an intervening embargo after a delay in transit which was caused by negligence. The *Malcolm Baxter*, 277 U. S. 323, 334; Cf. *Northern Ry. Co.* v. *Page*, 274 U. S. 65, 74; *St. Louis-San Francisco Ry. Co.* v. *Mills*, *supra*.

Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury." (pp. 483-484)

In *Moore, Admx.* v. *Chesapeake & Ohio Railway Co.*, 340 U. S. 573 (February 26, 1951) the action was under the Federal Employers' Liability Act, on behalf of the widow and children of a deceased employee. The complaint charged that while working as a brakeman, decedent was killed as the result of the negligence of the defendant within the meaning of the Act. The trial Court directed judgment in favor of the defendant railroad. This was affirmed by the Court of Appeals (184 Fed. (2d) 176) and this Court after reviewing the case, also affirmed.

The facts, as taken from the opinion of this Court, were as follows. Decedent was employed by the railroad as a brakeman in its switching yards. About 3:50 P.M. on a fair day, the crew with which decedent was working undertook its first car movement for the day. An engine and tender were headed into Track 12 and the front end of the engine was coupled onto 33 loaded freight cars which were to be moved out initially upon the straight track referred to as the ladder track. The switch at the junction of Track 12 and the ladder track was properly aligned for the train to pass onto the ladder track. Decedent gave the signal for the engine to back out of Track 12 with the cars. It moved out in a westerly direction, with the rear of the tender as the front of the moving train. Decedent was standing on a footboard at the rear of the tender, his back to the tender; the outer edge of the footboard was about ten inches in from the outer edge of the tender and about a foot above the rail. The engineer was in his seat on the same side of the train as the footboard on which decedent was standing. The engineer was turned in the seat and leaning out the side cab window, looking in the direction in which the train was moving. Decedent's duty as he rode on the footboard was to give signals to the engineer, who testified that he

could at all times see the edge of the arm and shoulder of decedent. To be thus seen and in a position to give signals, decedent had to extend outward beyond the edge of the tender, supporting himself partly by a handrail, otherwise the tender, the top of which was eight feet seven inches above the footboard, would have obstructed the engineer's view of him altogether.

The engineer testified that as the train approached switch 12 at about five miles an hour, having moved ten or twelve car lengths, he saw decedent slump as if his knees had given way, then right himself, then tumble forward in a somersault towards the outside of the track. The engineer testified that he made an emergency stop in an unsuccessful effort to avoid injuring decedent. The train ran the length of the tender and engine and about a car length and a half before it stopped at a point about an engine or car length past the switch on the ladder track. Decedent died immediately of the injuries received.

This Court in affirming the entry of a judgment in favor of the defendant railroad by the trial Court said (pp. 575 to 578):

> "To recover under the Act, it was incumbent upon petitioner to prove negligence of respondent which caused the fatal accident. *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 32. The negligence she alleged was that respondent's engineer made a sudden and unexpected stop without warning, 'thereby causing decedent to be thrown from a position of safety on the rear of the tender' into the path of the train.
>
> "It is undisputed that only one stop of the train was made and that a sudden stop without warning. The engineer was the only witness to the accident and was called to testify by pettioner. He testified that he saw decedent fall from the tender and that he made an emergency stop in an attempt to avoid injuring him. He testified that he received no signal to stop and had no reason to stop until he saw decedent fall.

When his attention was directed to the point, the engineer never wavered in his testimony that decedent was continuously in his view and in a position to give signals up to the time he was seen to fall and the emergency stop was made.

"Petitioner attempts to avoid the effect of this by pointing to statements of the engineer which allegedly contradict his testimony that decedent was continuously in his view. Petitioner relies on testimony and measurements of an expert witness, and upon the fact that the jury was permitted to view the engine and tender, to support the alleged contradiction. As a consequence, it is asserted, the jury was entitled to disbelieve the engineer's version of the accident and to accept petitioner's.

"True, it is the jury's function to credit or discredit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof. *Bunt* v. *Sierra Butte Gold Mng. Co.*, 138 U. S. 483, 485. Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it.

"The burden was upon petitioner to prove that decedent fell after the train stopped without warning, which was the act of negligence she charged. Her evidence showed he fell before the train stopped. The only evidence which petitioner can glean from this record to support her charge is the engineer's testimony that there was no one around the switch as the train approached it, and that he did not know whether 'they' intended to take all of the 33 cars out of the switch at one time, or to stop and cut off some of them. From this it is said a jury might reasonably infer that the engineer decided to make and did make an emergency stop which threw decedent from the tender. However, the engineer's testimony, appearing at the very same page of the transcript as the statement relied on, was that he worked by signals; that he had

received no signal to stop or do anything; that in the event he did not receive a signal he would '(k) eep pulling the cars on back' until he received a signal, until he 'cleared the switch'—'(p) robably beyond.' We do not think that the isolated portion of the engineer's testimony relied on by petitioner permits an inference of negligence when placed in its setting of uncontradicted and unequivocal testimony totally at variance with such an inference.

"Hence, all the evidence shows is that decedent fell before the train stopped. If ones does not believe the engineer's testimony that he stopped after—indeed, because of—the fall, then there is no evidence as to when decedent fell. There would still be a failure of proof.

"To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. *Galloway* v. *United States*, 319 U. S. 372, 395.

"Since there was no evidence of negligence, the court properly sustained the motion for judgment notwithstanding the verdict. The judgment is

Affirmed."

In *Eckenrode* v. *Pennsylvania R. R. Co.*, 164 Fed. (2d) 996 (C. C. A. 3rd May, 1947), affd. 335 U. S. 329, 330 (October, 1948) the action was under the Federal Employers' Liability Act to recover damages due to the death of Eckenrode. The case was submitted to the jury which returned a verdict for the plaintiff. The trial Court set the verdict aside on the ground that there was no evidence on which the jury could find against the defendant. On the plaintiff's appeal the judgment of the trial judge was affirmed by both the Court of Appeals and this Court.

The facts as obtained from 164 Fed. (2d), page 998, disclosed the following. About noon on October 8, 1943, Eckenrode was a member of a train crew of the Pennsylvania Railroad Company. This crew was working near Cresson, Pa. An engine had pulled four loaded coal cars from a spur track onto the main track and attached them to eighteen other loaded cars standing on the main track. Eckenrode, after effecting the coupling of these cars went to the caboose where he then belonged. The engine was then to push these 22 cars up the main track, where they would be joined to others. The tracks were on an upgrade and the engine was at the rear of the 22 cars. Brakeman McGowan was at the head end of the 22 cars giving the signals for stopping and starting. The engineer and fireman were in the cab of the engine. The engineer applied the power. The train moved a little and then the wheels spun rapidly without producing the necessary traction. The engineer closed the throttle and tried again. The result was the same. This was repeated several times. Each attempt produced a slow forward movement at a speed of not more than a mile and one-half an hour.

While this was in progress, Eckenrode left the caboose, walked up past the engine cab, making joking or derisive comments to the engineer who replied in kind. Eckenrode continued to walk beyond the engine and to the side away from it. This was the last that the engineer saw Eckenrode before he was killed. The brakeman, McGowan, however, saw Eckenrode, starting to walk back diagonally up the bank toward the train. He was stooping down, evidently picking something up. In less time than it takes to tell it, somehow Eckenrode's head had been struck between the lap and head lever and the cylinder head of the engine. These levers shoot back and forth rapidly when the wheels spin. The Circuit Court of Appeals said (pp. 999-1000):

> "Out of this we cannot see a scintilla of evidence on which negligence can be found. For a man to be charged with negligence in failing to take precautions

there must be some danger toward which these precautions should be directed. Now what was the danger here? From a position of safety in the caboose, back of the engine, comes Eckenrode. He has no duties with regard to the movement of the train at this point. He walks past the cab and he and the engineer exchange talk. Then he starts off along the spur which will take him further away from the train every step. What is there to watch out for? Eckenrode knows the train crew's problem as well as any of the rest of these men. The evidence showed that he had not only been a railroad man for more than forty years, but he worked this very run and had done this very job for several years preceding the accident. We think that there was nothing in his conduct to give notice to the engineer of any possible danger involved in the situation. We see no reason why Sunderlin should have kept watch for Eckenrode, who knew as much about what had happened and what they were trying to make happen as the engineer, himself, did. But, further, even if Sunderlin had operated his throttle by touch and kept his eyes on Eckenrode all of the time, still the latter's conduct gave no indication of danger. Going down Hastings Fuel spur was certainly not conduct against which Eckenrode should have been protected, nor was his climbing up the bank so as to get nearer his train. After all, he had to rejoin that train.

"The point we are making does not involve assumption of risk. That is out of this law. Nor does it involve contributory negligence. The jury has found that Eckenrode was contributorily negligent. We are not at all sure that that finding could be sustained for it is just as speculative as is a negligence charge against the company. What we are talking goes to the very foundation of liability. It has to do with the duty of Sunderlin, in charge of the operation of the engine, to take precautions against an experienced fellow member of his train crew acting in a wholly unexpectable

and unreasonable fashion. We see nothing on which any charge against the company based upon carelessness of the locomotive's crew could possibly be sustained.

"The brakeman, McGowan, saw Eckenrode stoop and apparently pick up something. Assuming that what he picked up was sand and McGowan should have recognized it, that would still leave no basis for finding negligence. For even assuming that McGowan should have realized that Eckenrode picked up sand, there was no reason for charging him with negligence in his failing to anticipate that Eckenrode would come up close to the engine and do anything relative to the movement of the train with two handfuls of sand. We do not, in fact, know what Eckenrode was doing with the sand, assuming that he had any. Even if it may be inferred that he was trying to sand the tracks with it, it is too much to say that McGowan or other members of the train crew are to be charged with negligence in failing to anticipate this completely unexpectable operation on Eckenrode's part.

"Any Federal Judge who sees these railroad accident cases come in and go out of the Courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet in each case the injury has come as part of the business of train movement and the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist. It does not exist in this case.

"The judgment of the District Court will be affirmed."

This Court, affirming the Court of Appeals for the Third Circuit, said (335 U. S. p. 330):

"There is a single question presented to us: Was there any evidence in the record upon which the jury could have found negligence on the part of the respondent which contributed, in whole or in part, to Eckenrode's death? Upon consideration of the record, the Court is of the opinion that there is no evidence, nor any inference which reasonably may be drawn from the evidence, when viewed in a light most favorable to the petitioner, which can sustain a recovery for her. Accordingly, the judgment is affirmed."

We respectfully submit therefore, that the New Jersey Supreme Court did not err in affirming the action of the Courts below in granting judgment in favor of the respondent.

II.

The petitioner cannot obtain a review in this Court of questions not raised in or decided by the New Jersey Supreme Court.

Under Point III of petitioner's brief (p. 17) it is argued that because the trial Court sustained certain objections to questions propounded to several witnesses of the petitioner, there was a denial by the trial Court of her "constitutional right to a jury trial and due process of law." The petitioner took an appeal from the judgment entered against her to the Appellate Division of the Superior Court (P9a). On that appeal she urged two grounds for reversal. The first was that the trial Court erred in entering judgment against her. The second was that the trial Court erred in various rulings relating to the exclusion of testimony and in holding that a proffered expert witness did not possess the necessary qualifications to give opinion evidence. The Appellate Division considered all of these objections and said (P149a-5):

"We have examined the record as to plaintiff's allegations of error in the trial court's exclusion of certain testimony and we find that practically all of the excluded evidence had either been testified to or was repetitious. In addition thereto, the questions concerning witnesses' conclusions as to practices of the defendant company or customs of the trade, were not shown to have been addressed to persons of qualified expert background. These latter matters are addressed to the discretion of the court and unless shown to be clearly erroneous as a matter of law, that court's action is conclusive. (Citing cases)."

Under the New Jersey practice the petitioner had the right to and in fact did file a Petition for Certification in the New Jersey Supreme Court. The reasons set forth in that petition did not seek a review of the Appellate Division's ruling above quoted. The New Jersey Supreme Court granted the certification. The petitioner did not urge or argue any of these questions before the New Jersey Supreme Court and as will be disclosed by the opinion of that Court they were not passed upon. We therefore have the situation where this Court is asked to review certain rulings on the exclusion of evidence that the petitioner did not ask the highest court of the state to pass upon.

It is well settled that this Court, in reviewing the judgment of a state court, will not pass upon any question not shown by the record, to have been raised in the state court or considered there.

Wilson v. *Cook*, 327 U. S. 474, 483 (Mar. 1946) and the cases cited therein.

CONCLUSION

It is, therefore, respectfully submitted that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

JAMES J. LANGAN,
Counsel for Respondent.

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Supreme Court, U. S.
FILED
MAY 28 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1953

No. 727

KATHERINE SHELLHAMMER, General Administratrix of the Estate of Walter R. Shellhammer, deceased,
Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's brief discusses the merits of the case, rather than the principle of law sought to be reviewed.

The crux of respondent's position is that the evidence lends greater support to inferences of freedom of fault, rather than negligence. Such argument is beside the point.

The three cases upon which respondent relies are not persuasive. They all treat with situations where the uncontradicted evidence conclusively established the railroad's freedom of fault.

1. *Brady, Admx.* v. *Southern Railway Co.*, 320 U. S. 476 (Dec., 1943), pages 13 and 14 of respondent's brief. The Court held the events were too remote to question the only reasonable conclusion;—that the railroad was free from any negligence. There was no issue of fact.

2. *Moore, Admx.* v. *Chesapeake & Ohio Railway Co.*, 340 U. S. 573 (February 26, 1951), aff'g 184 Fed. (2d) 176

(August 10, 1950), pages 13, 14, 15 and 16 of respondent's brief. The uncontradicted evidence showed that the decedent fell before the train stopped, hence, the sudden stopping of the train could not possibly have been the cause of the accident. There was no issue of fact.

3. *Eckenrode* v. *Pennsylvania R. Co.*, 164 Fed. (2d) 996 (C. C. A. 3rd, Dec., 1947), aff'd 335 U. S. 329, 330 (November, 1948), pages 17, 18, 19 and 20 of respondent's brief. The decedent was killed solely as a result of his own fault, in acting in an unreasonable fashion and placing himself in a place of danger. There was no substantial dispute as to the manner of the happening of the accident.

Petitioner takes no issue with the principles laid down in the other cases cited by respondent.

At page 11 of respondent's brief, reference is made to Rule 26, the so-called "Blue Flag Rule", a rule to obviate injury to men working trains.

The legal presumption of due care for one's self, as well as the testimony that Gumhold and Helmstetter had been doing work at the cars connecting air hoses, D 42A-15, would support the inference that the blue signal had been properly placed.

The respondent was in a position to investigate the manner of the happening of the accident at the time of its occurrence. It was in a position to inquire as to the reason for the train starting for Oak Island with Shellhammer being absent from the caboose. Furthermore, respondent was in a position to ascertain what happened to Shellhammer's second work glove, the wrench as well as the aforementioned blue signal or lamp.

May we humbly submit that interpretation of existing law should be consistent with the rapid advancement of modern civilization. That to interpret law now in the manner applicable to horse and buggy times, would be tanta-

mount to the mortmain of obsolete, petrified, *stare decisis*, placing justice in a legal strait jacket.

Realistically, employees do not have the freedom of action to give full and complete testimony against their employers, as they are ever confronted with the danger of economic reprisal.

An experienced superintendent of railroad car inspectors does not have his head cut off by the wheels of a train, unless somebody is negligent.

The presumption of due care being in decedent's favor, the railroad in such instance should be required to go forward with the evidence, particularly, where the circumstantial evidence justified a reasonable inference of breach of duty and other fault.

Respectfully submitted,

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